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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1057

DOROTHY I. YUHAS AND NANCY ANDERSON,
Petitioners,

vs.

LIBBEY-OWENS-FORD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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No.

DOROTHY I. YUHAS AND NANCY ANDERSON,
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LIBBEY-OWENS-FORD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Dorothy I. Yuhas and Nancy Anderson, hereby petition the Court for the issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review its judgment entered September 28, 1977 reversing a judgment in favor of petitioners entered December 17, 1976 by the United States District Court for the Northern District of Illinois, Eastern Division.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Seventh Circuit entered September 28, 1977, review of which is sought, is reproduced in the Appendix at page 1a. The

opinion of the United States Court of Appeals for the Seventh Circuit, filed September 28, 1977, is reported as *Yuhas* v. *Libbey-Owens-Ford Company*, 562 F.2d 496 (7th Cir. 1977), and is reproduced in the Appendix at pages 2a-10a. The order of the United States Court of Appeals for the Seventh Circuit entered December 2, 1977, denying petitioners' petition for rehearing in banc, is reproduced in the Appendix at page 11a.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, filed March 25, 1976, ruling on the parties' cross motions for summary judgment is reported as *Yuhas* v. *Libbey-Owens-Ford Company*, 411 F. Supp. 77 (N.D. Ill. 1976), and is reproduced in the Appendix at pages 12a-15a.

The oral opinion of the district judge ruling in favor of petitioners on the issue of liability, which was delivered on December 15, 1976 at the conclusion of the trial, is not reported. The opinion is reproduced in the Appendix at pages 16a-20a.

The Injunction Order entered in the district court on December 17, 1976 is reproduced in the Appendix at pages 21a-22a.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered September 28, 1977. A timely petition for rehearing was filed, and was denied by the court of appeals on December 2, 1977.

Jurisdiction to review the judgment of the court of appeals by certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Whether, in order to establish the defense of business necessity in a sex based discrimination case arising under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*), an employer need only show that a discriminatory employment policy "plausibly improves the work environment".

2. Whether proof of sex based discrimination practiced by an employer prior to the enactment of Title VII is a necessary element of a plaintiff's case under Title VII challenging an employment policy which is neutral on its face but which in operation has a disproportionate, discriminatory impact on females.

3. Even assuming that proof of historical discrimination is a necessary element of a disproportionate impact case under Title VII, whether proof that an employer's work force was predominantly (in this case 97%) male at the time of the enactment of Title VII raises a presumption of historical sex based discrimination and shifts the burden of proof on the issue to the employer.

STATUTE INVOLVED

The case arises under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, certain key portions of which are set forth in the Appendix at pages 23a-36a.

STATEMENT OF THE CASE

I.

Statement of Facts

The following statement of the facts is based on the statement of facts in the opinion of the court of appeals (A.* 2a-3a).

Respondent Libbey-Owens-Ford Company operates two plants in Ottawa, Illinois. The company has a rule against hiring an hourly employee at these plants when the applicant's spouse is already employed there in the same capacity. The rule was

* All references herein to the Appendix to this petition are to "A."

promulgated at the Ottawa plants on July 1, 1968 as an extension of a company policy which has been in effect since before 1953. The rule is directed only to the hiring of new employees, whether male or female. It does not require discharging either spouse of couples already married on July 1, 1968 (there were 38 such couples), and does not require terminating an employee who marries a fellow employee.

On June 30, 1969, petitioner Dorothy I. Yuhas applied for employment as an hourly employee at respondent's Ottawa plants. Her application was denied, pursuant to the no-spouse rule, because her husband was then employed as an hourly employee at one of those plants.

Contending that she was the victim of sexual discrimination, petitioner Yuhas filed charges against respondent with the Equal Employment Opportunity Commission on August 15, 1969. The gravamen of her claim was that the no-spouse rule had a discriminatory effect because since its inception seventy-one women, compared to three men, had been denied employment for the reason that their spouses were already employed as hourly employees. Petitioner Yuhas obtained a right-to-sue letter from the EEOC on June 2, 1972, and filed this action in the United States District Court for the Northern District of Illinois, Eastern Division, on August 22, 1972. Jurisdiction in the district court was based on 42 U.S.C. § 2000e-5(f). The court permitted petitioner Nancy Anderson, who was denied employment pursuant to the no-spouse rule in August 1972 and received a right-to-sue letter on May 23, 1973, to join in the action as a party-plaintiff on May 30, 1973. Plaintiffs maintained the action on behalf of themselves and the class of all similarly-situated women.

II.

Proceedings Below

The case was originally assigned to a magistrate pursuant to a local rule of the district court under which all Title VII cases were assigned to magistrates immediately upon filing. Petitioners

and respondent filed cross motions for summary judgment before the magistrate, and respondent's motion was granted by the district court on the recommendation of the magistrate. Petitioners appealed to the United States Court of Appeals for the Seventh Circuit, which, in an unreported order, vacated the judgment and remanded the case *sua sponte* on the authority of *Flowers* v. *Crouch-Walker Corporation*, 507 F.2d 1378 (7th Cir. 1974), decided during the pendency of the appeal, which held the local district court rule for assignment of Title VII cases to magistrates invalid.

On remand, the parties renewed their cross motions for summary judgment. The district judge found that the no-spouse rule had excluded 71 females and only three males from employment, and that the rule, even though neutral on its face, therefore had a "greatly disparate impact" on females. (A. 12a-13a; 411 F. Supp. at 77) The court held that the evidence of the disparate, discriminatory impact of the no-spouse rule made out a prima facie case under *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). (A. 13a; 411 F. Supp. at 77-78) The district judge rejected respondent's argument that *Griggs* applies only where there is a showing of past discrimination, and held that in any event the evidence that respondent's work force was 97% male at the time the no-spouse rule was adopted raised a presumption of historical discrimination against females and shifted the burden to respondent to show an absence of discrimination. (A. 14a; 411 F. Supp. at 78) The court held that since petitioners had established a prima facie case, the burden was shifted to respondent to demonstrate a business necessity for the rule, which would require respondent to "show that there is no equally effective alternative available with a lesser discriminatory impact." (A. 15a; 411 F. Supp. at 79) The district judge then denied both motions for summary judgment on the ground that disputed issues of fact were present on the defense of business necessity. (A. 15a; 411 F. Supp. at 79)

At a bench trial on the issue of liability, respondent attempted to prove five alleged justifications for the no-spouse

rule: (1) reduction of absenteeism, (2) reduction of tardiness, (3) potential cost and production factors, (4) problems in vacation and shift scheduling and work assignments, and (5) potential problems relating to the plant grievance procedure, spousal interrelationships and employee morale. The district court ruled that respondent's evidence did not prove any of these justifications and that the defense of business necessity had not been established. (A. 16a-19a) The district court therefore enjoined further application of the no-spouse rule (A. 21a-22a), and respondent appealed.

The court of appeals affrmed the ruling that the evidence of the disproportionate impact of the no-spouse rule established a prima facie case (A. 6a; 562 F.2d at 498), and also affirmed the district court's finding that respondent had not demonstrated that the rule was necessary to prevent excessive absenteeism or tardiness, or that without the rule scheduling of vacations and work assignments would be more difficult (A. 7a; 562 F.2d at 499). However, the court of appeals then held that although, as the district court had held, there was no evidence linking the no-spouse rule and production at respondent's plants, the rule did not violate Title VII because petitioners had not shown that the disparity in the work force (97% male, 3% female) was the result of historical discrimination by respondent, and because respondent's evidence demonstrated that "the no-spouse rule plausibly improves the work environment". (A. 7a-10a; 562 F.2d at 500) The court therefore reversed and remanded the case to the district court for further proceedings consistent with its opinion. The opinion of the court of appeals does not touch on the district court's finding that the evidence of the disparity in the work force raised a presumption of historical discrimination which was not rebutted by respondent.

Petitioners filed a petition for rehearing in banc based on the conflict between the opinion of the court of appeals and decisions of courts of appeals for other circuits, which petition was denied on December 2, 1977. (A. 11a)

REASONS FOR GRANTING THE WRIT

Since the decision of this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the lower federal courts have been involved in a process of defining the elements of a prima facie case and of the defense of business necessity in cases wherein the illegality of an employment policy or practice is predicated on its disproportionate impact on members of a class protected under Title VII. This is the first case in which these issues have been contested in the Court of Appeals for the Seventh Circuit, and its decision here is in conflict with the decisions of the other courts of appeals which have considered the questions. Certiorari should be granted to resolve this conflict between the circuits, to settle these important questions of federal law under Title VII, and to eliminate an apparent conflict between certain aspects of the decision below and prior decisions of this Court.

I.

Certiorari Should Be Granted to Resolve a Conflict Between the Circuits on the Question of the Standard Which Controls the Business Necessity Defense.

In *Griggs*, this Court held that—

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

401 U.S. at 431. A conflict exists between the decision of the Seventh Circuit in this case and decisions of the Second, Fourth, Fifth, Sixth and Eighth Circuits on the question of what must be shown to establish the defense of "business necessity."

The first court of appeals decision after *Griggs* dealing with the business necessity question was *United States* v. *Bethlehem Steel Corporation*, 446 F.2d 652 (2d Cir. 1971), in which seniority and transfer policies were challenged on the ground

that they had the effect of discriminating against blacks. The Second Circuit rejected the argument that the policies had been shown to be justified by considerations of plant safety and efficiency, and stated the standard governing the business necessity defense as follows:

> [T]he "business necessity" doctrine must mean more than that transfer and seniority policies serve legitimate management functions. . . . Necessity connotes an irresistible demand. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals. [citations omitted] If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued.

446 F.2d at 662.

The strict standard governing business necessity which was applied by the Second Circuit in the *Bethlehem Steel* case has also been applied by the Fourth, Fifth, Sixth and Eighth Circuits in the following cases: *Robinson* v. *Lorillard Corporation*, 444 F.2d 791, 798 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971); *Rock* v. *Norfolk and Western Railway Company*, 473 F.2d 1344, 1349 (4th Cir. 1973), *cert. denied*, 412 U.S. 933 (1973); *Rodriguez* v. *East Texas Motor Freight*, 505 F. 2d 40, 56, *vacated on other grounds*, ____ U.S. ____, 52 L Ed 2d 453 (1977); *Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721, 730 (5th Cir. 1976); *Head* v. *Timken Roller Bearing Company*, 486 F.2d 870, 879 (6th Cir. 1973); *Equal Employment Opportunity Commission* v. *New York Times Broadcast Service, Inc.*, 542 F.2d 356, 361 (6th Cir. 1976); *United States* v. *St. Louis-San Francisco Railway Company*, 464 F.2d 301, 308 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973); *Wallace* v. *Debron Corporation*, 494 F.2d 674, 677 (8th Cir. 1974); *Green* v. *Missouri Pacific Railroad Company*, 523 F.2d 1290, 1297-98 (8th Cir. 1975).

It is thus apparent that the rule in the Second, Fourth, Fifth, Sixth and Eighth Circuits, as established by the cases cited above, is that a business necessity exists only where the justification offered by the employer is "overriding"; that the policy must not only foster the justification offered, but must be "essential" to it; and that there must be no acceptable alternative which will accomplish the goal equally well with a lesser discriminatory impact. The Seventh Circuit has applied a materially different and less stringent standard in this case. The court of appeals specifically affirmed the finding that respondent did not show that the no-spouse rule was "necessary to prevent excessive absenteeism or tardiness, or that without the rule the scheduling of vacation and work assignments would be more difficult", and the court specifically held that "there is no evidence in the record linking the rule and production in defendant's Ottawa plants." (A. 7a; 562 F.2d at 499) Despite these findings, the court of appeals held that the no-spouse rule did not violate Title VII because the rule "plausibly improves the work environment". (A. 10a; 562 F.2d at 500) That conclusion was based on four suppositions: (1) husbands and wives working together may not be able to control their emotional feelings, (2) one spouse "might" take the same side as the other in a grievance with the employer, (3) problems "could arise" if one spouse was promoted to a supervisory position, and (4) one spouse may intervene in the hiring process on behalf of the other. (A. 7a-8a; 562 F.2d at 499) The court did not impose any requirement for a showing that no less discriminatory alternative to the no-spouse rule is available to accomplish the improvement of the work environment which is plausibly fostered by the no-spouse rule.

The court of appeals has in this case exchanged the requirement of an "essential" and "overriding" business purpose for a rule of "plausibility," and has completely discarded the requirement for a showing of no acceptable alternative to a discriminatory rule. A conflict therefore exists between the circuits on an important question of federal law, and certiorari should therefore be granted.

II.

Certiorari Should Be Granted to Resolve a Conflict Between the Circuits on the Question of Whether Proof of Historical Discrimination Is Required to Establish a Violation of Title VII in a Disproportionate Impact Case, and Because the Decision Below Is Inconsistent with Applicable Decisions of This Court.

It has been the position of the respondent in this case that the law is, or should be, that a policy like the no-spouse rule which is neutral in form but which operates in a discriminatory manner violates Title VII only if it is shown that the rule serves to perpetuate discrimination practiced by the employer in the past. The Seventh Circuit accepted that argument and held that proof of historical discrimination was a necessary element of petitioners' case. The court stated:

> This would be a different case if plaintiffs had shown that defendant historically employed more men than women in its Ottawa plants because it intentionally discriminated against women. There is no evidence in the record supporting such a finding, however, and we must assume that the present disparity between men and women in the Ottawa plants was the result of noninvidious factors.

(A. 9a; 562 F.2d at 500) The Seventh Circuit has thus established proof of historical discrimination as an element of a prima facie case in Title VII cases wherein the violation is predicated on the disproportionate, discriminatory impact of a facially neutral policy or rule. The Seventh Circuit's decision is in direct conflict with cases in which the Eighth and Ninth Circuits have specifically held that proof of historical discrimination is not required in a disproportionate impact case. *Wallace* v. *Debron Corp.*, 494 F.2d 674, 675-76 (8th Cir. 1974); *Gregory* v. *Litton Systems, Inc.*, 472 F.2d 631, 632 (9th Cir. 1972).

Although this specific question has not been decided directly by this Court, the Seventh Circuit's requirement of proof of

historical discrimination is inconsistent with the general rule established by *Griggs* and the cases following it. In *Dothard* v. *Rawlinson*, this Court, referring to its earlier decisions in *Griggs* and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), stated that "Those cases make clear that to establish a prima facie case of discrimination, a plaintiff need *only* show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." ____ U.S. ____, ____, 53 L Ed 2d 786, 797 (1977) (emphasis added). The Seventh Circuit has added an additional element of proof to the prima facie case not contemplated by the decisions of this Court.

Certiorari should be granted because of the conflict between the circuits and the conflict with the decisions of this Court.

III.

Certiorari Should Be Granted to Resolve a Conflict Between the Circuits on the Question of Whether Proof of a Significant Disparity in the Composition of a Work Force Raises a Presumption of Discrimination.

In the Fifth and Eighth Circuits, the rule is that proof of a significant disparity in the composition of a work force as compared to the population at large raises a presumption of discrimination, shifting the burden to the employer to prove that the disparity is not the result of discrimination. *See, e.g., United States* v. *Jacksonville Terminal Company*, 451 F.2d 418, 450 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); *Rowe* v. *General Motors Corporation*, 457 F.2d 348, 358 (5th Cir. 1972); *Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721, 729-30 (5th Cir. 1976); *Parham* v. *Southwestern Bell Telephone Company*, 433 F.2d 421, 426 (8th Cir. 1970); *Gilmore* v. *Kansas City Terminal Railway Company*, 509 F.2d 48, 52 (8th Cir. 1975). Although the proof of discrimination in *International Brotherhood of Teamsters* v. *United States*, ____ U.S. ____, 52 L Ed 2d 396 (1977), did not depend solely on statistical evidence of disparity in the work force, this Court did,

at the least, indicate approval of the rule that such evidence raises a presumption of discrimination. *See*, ____ U.S. at ____, 52 L Ed 2d at 416-18.

In this case, the district court first held that proof of historical discrimination was not required, but then went on to find that even if such proof were considered to be necessary, the great disparity in the composition of respondent's work force, which was found to be 97% male and 3% female, raised a presumption of historical discrimination, and that the burden was thereby shifted to respondent to explain the disparity. (A. 14a; 411 F. Supp. at 78) Respondent never offered any such explanation. This ruling by the district judge is in complete accord with the rule in other circuits as established by the cases cited above and with the later decision in the *Teamsters* case.

On appeal, the Seventh Circuit, after holding (erroneously in petitioners' view) that proof of historical discrimination was required, did not accept the district court's ruling that the unexplained disparity in the work force established that such discrimination existed. Rather, the court of appeals held that in the absence of proof by petitioners of intentional past discrimination, "we must assume that the present disparity between men and women in the Ottawa plants was the result of noninvidious factors." (A. 9a; 562 F.2d at 500) The Seventh Circuit's approach to this proof of discrimination question is contrary to the rule in other circuits and is in conflict with this Court's decision in the *Teamsters* case, and certiorari should therefore be granted.

Respectfully submitted,

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Appendix

I.

JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Opinion by Judge Swygert

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 28, 1977

Before

HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*

DOROTHY I. YUHAS and NANCY ANDERSON, *Plaintiffs-Appellees,* vs. LIBBEY-OWENS-FORD COMPANY, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 72-C-2082. John F. Grady, Judge.

No. 77-1143

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and the cause is REMANDED, in accordance with the opinion of this court filed this date.

II.

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 77-1143

DOROTHY I. YUHAS and NANCY ANDERSON,

Plaintiffs-Appellees,

vs.

LIBBEY-OWENS-FORD COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72 C 2082—John F. Grady, *Judge.*

ARGUED JUNE 10, 1977—DECIDED SEPTEMBER 28, 1977

Before SWYGERT, SPRECHER and TONE, *Circuit Judges.*

SWYGERT, *Circuit Judge.* We must decide whether an employer's rule that a present employee's spouse may not be hired in a similar capacity violates the antidiscrimination provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* The district court found a violation. We take a contrary view and reverse.

I

Defendant Libbey-Owens-Ford Company operates two plants in Ottawa, Illinois. The company has a rule against hiring an

hourly employee at these plants when the applicant's spouse is already employed there in the same capacity. The rule was promulgated at the Ottawa plants on July 1, 1968 as an extension of a company policy which has been in effect since before 1953. The rule is directed only to the hiring of new employees, whether male or female. It does not require discharging either spouse of couples already married on July 1, 1968, and does not require terminating an employee who marries a fellow employee.

On June 30, 1969, plaintiff Dorothy I. Yuhas applied for employment as an hourly employee at defendant's Ottawa plants. Her application was denied, pursuant to the no-spouse rule, because her husband was then employed as an hourly employee at one of those plants.

Contending that she was the victim of sexual discrimination, Yuhas filed charges against defendant with the Equal Employment Opportunity Commission on August 15, 1969. The gravamen of her claim was that the no-spouse rule had a discriminatory effect because since its inception seventy-one women, compared to three men, had been denied employment for the reason that their spouses were already employed as hourly employees. Yuhas obtained a right-to-sue letter from the EEOC on June 2, 1972, and filed this action in the district court for the Northern District of Illinois on August 22, 1972. The court permitted Nancy Anderson, who was denied employment pursuant to the no-spouse rule in August 1972 and received a right-to-sue letter on May 23, 1973, to join the action as a party-plaintiff on May 30, 1973. Plaintiffs maintained the action on behalf of themselves and the class of all similarly-situated women.

After discovery and the reassignment of the case to a new district judge, each side moved for summary judgment on January 12, 1976. The district court found that although the no-spouse rule was sexually neutral on its face, it had "a greatly disparate impact." Under *Griggs* v. *Duke Power Co.*, 401 U.S.

424 (1971), the court held, plaintiffs had therefore made out a prima facie case for relief. This prima facie case could be rebutted only if defendant could show that the rule was job-related. The court found that there was a question of fact as to whether the rule was job-related which could only be resolved by a trial. 411 F. Supp. 77 (N.D. Ill. 1976).

At a bench trial, defendant attempted to demonstrate that the no-spouse rule served a legitimate, business-related function. It introduced evidence that hourly workers who are married to each other are absent from work or tardy in appearing for work more often than other workers. It also tried to show that the employment of both partners in a marriage led to problems in the scheduling of vacations and work assignments because both partners often wanted the same vacation and work assignment. Finally, it presented testimony that the employment of both spouses undermined employee morale and efficiency because the relationship between the spouses interfered with the ordinary relationships workers have with each other and with their supervisors.

On December 15, 1976, the district court held that the evidence introduced by defendant was insufficient to rebut plaintiffs' prima facie case. It found the statistical evidence of absenteeism and tardiness to be unconvincing, and rejected the validity of the other testimony presented by defendant on the ground that there was "no hard information as to what specific production problems were ever caused in any particular case." Accordingly, the court enjoined defendant from continuing to maintain its no-spouse rule.

Defendant now appeals. It contends both that the district court erred in holding that plaintiffs had made out a prima facie case of employment discrimination and that, in any event, the no-spouse rule is job-related.

II.

Defendant's argument that the district court erred in holding that plaintiffs had established a prima facie case is based on the claim that *Griggs*, which was a case of racial discrimination, should not be extended to cases of sexual discrimination. It contends, relying on *General Electric* v. *Gilbert*, 429 U.S. 125 (1976), that an employment rule which is not based on gender is not sexually discriminatory within the meaning of Title VII, regardless of whether the rule has a discriminatory impact.

We cannot accept this argument. In the recent case of *Dothard* v. *Rawlinson*, 45 U.S.L.W. 4873 (U.S., June 27, 1977), the Supreme Court expressly extended *Griggs* to a case of sexual discrimination. Alabama had a rule requiring all state prison guards to be at least five feet, two inches tall and to weigh at least 120 pounds. The rule excluded 41.13 percent of the female population in the United States while excluding less than one percent of the male population. The Court held that these statistics alone, without a showing of discriminatory intent, were sufficient to make out a prima facie case of unlawful sexual discrimination. It stated:

> The gist of the claim that the statutory height and weight requirements discriminate against women does not involve an assertion of purposeful discriminatory motive. It is asserted rather, that these facially neutral qualification standards work in fact disproportionately to exclude women from eligibility for employment by the Alabama Board of Corrections. We dealt in *Griggs* v. *Duke Power Co.*, *supra*, and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, with similar allegations that facially neutral employment standards disproportionately excluded Negroes from employment, and those cases guide our approach here.
>
> Those cases make clear that to establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern. Once it is thus shown that the employment standards are discrimina-

> tory in effect, the employer must meet "the burden of showing that any given requirement [has] . . . a manifest relation to the employment in question." *Griggs* v. *Duke Power Co.*, 401 U.S. at 432. 45 U.S.L.W. at 4890 (footnote omitted).

Dothard governs the case at bar. Like the Alabama rule, defendant's no-spouse rule is not gender-based and does not intentionally discriminate against women. But again like the Alabama rule, the no-spouse rule has a substantial discriminatory impact which is demonstrated by the statistic that seventy-one of the last seventy-four people disqualified under it were women. It therefore is invalid under Title VII unless defendant can show that it is job-related. *See also United States* v. *City of Chicago*, 549 F.2d 415, 427 (7th Cir. 1977).

We do not find this result to be at odds with *General Electric* v. *Gilbert*. The plaintiffs in *General Electric* challenged the validity of the company's disability plan, which excluded disability benefits arising from pregnancies. The Court held that the plan did not violate Title VII for two reasons: first, because it was not gender-based and therefore did not intentionally discriminate against women; and second, because plaintiffs had not made a showing that the plan would have a discriminatory impact. 429 U.S. at 133-40. The Court in no way intimated that *Griggs* would not be applicable if plaintiffs had been able to demonstrate that the plan had a discriminatory impact. Moreover, even if isolated language in the *General Electric* opinion could be read as *sub silentio* overruling Griggs or restricting it to cases of racial discrimination, *see* 429 U.S. at 153 (Brennan, J., dissenting), the Court's square holding in the more recent *Dothard* case prohibits such an interpretation.

III.

We therefore turn to a determination of whether the no-spouse rule is job-related. The district court held that defendant failed to satisfy its burden of proof on this issue. The court

first found that defendant failed to demonstrate by statistical evidence that its rule was necessary to prevent excessive absenteeism or tardiness, or that without the rule the scheduling of vacation and work assignments would be more difficult. This finding is not clearly erroneous and we affirm it on appeal.

The court also rejected defendant's assertion that the rule prevented situations which could undermine employee morale and efficiency. The court found that defendant had not proved this assertion because it had not shown that production would fall if the rule were discarded. We cannot argue with the factual predicate of this statement, for there is no evidence in the record linking the rule and production in defendant's Ottawa plants.

However, unlike the district court, we do not find that these facts conclusively demonstrate that the rule was not job-related. The no-spouse rule is predicated on the assumption that it is generally* a bad idea to have both partners in a marriage working together. There are a number of reasons why this assumption is plausible. First, the marital relationship often generates intense emotions which would interfere with a worker's job performance. The typical employee is often able to temporarily put aside these emotional feelings when he or she goes to work because the work environment is sharply differentiated from the home environment. This distinction becomes impossible if the employee's spouse is also his or her coworker.

Second, if an employee who works with his or her spouse became involved in a grievance with the employer or another worker, the two spouses might be expected to take the same side in the dispute. This factor could hamper the expeditious resolution of grievances.

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* Plaintiffs argue that we should not permit defendant to maintain the no-spouse rule because it has not extended the rule to its executives. We cannot accept this reasoning. Defendant is under no obligation to be consistent in its company policy. By not extending the no-spouse rule to executives, defendant loses whatever benefits the rule confers. But that is a matter of policy for defendant to decide.

Third, if both partners in a marriage were employed together, and one spouse was promoted to a supervisory position, numerous problems could arise. One spouse might resent the other's promotion, preventing the promoted worker from efficiently performing his or her new job. The person in the supervisory position might have a great deal of difficulty in imposing discipline on or otherwise exercising authority over his or her spouse. Moreover, the other workers who were placed under the authority of the higher-ranking partner might resent the "advantage," which his or her spouse received, whether or not the supervisor in fact favored his or her spouse.

Finally, a no-spouse rule eliminates the possibility of the already-employed marriage partner intervening in the hiring process on behalf of his or her spouse, to the detriment of the employer and any more qualified persons who did not obtain the job because of this intervention.

It would be hard to prove that any of these reasons for maintaining a no-spouse rule are valid in the sense that, without the rule, production would fall. Our devices for measuring industrial efficiency and morale are not so finely tuned that they can easily make such a determination. On the other hand, these reasons are far from frivolous. They correspond to the reasons which have led a number of institutions to conclude that family members should not work in the same environment. The movement to a sharp dichotomy between the workplace and the home may not in the long run prove to be a fruitful one, but it has become widely prevalent in our society.

We are therefore left in a difficult situation. Defendant cannot statistically prove that its rule increases production, but its arguments that the rule "improves" the workplace are convincing. In our judgment the solution to this problem lies in examining the animating spirit behind the *Griggs* rule. The *Griggs* Court stated: "We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not

redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." 401 U.S. at 432. The rule which *Griggs* laid down later in the opinion—that an employment practice with a discriminatory impact is invalid unless it is job-related—must be examined in light of this earlier statement.

The no-spouse rule in this case does not operate as a "built-in headwind" for women. It is unlike the requirement in *Griggs* that an employee have a high school diploma, or a rule that only the top-ranking contestants on a standardized test will be selected for employment, *see United States* v. *City of Chicago,* 549 F.2d 415 (7th Cir. 1977), or the rule in *Dothard* that only people of a certain size may be hired. These employment tests all had a discriminatory impact because they focused on personal characteristics which members of a minority group were not as likely to possess, given their environmental or genetic background, as other job applicants. The no-spouse rule, on the other hand, does not place women at a disadvantage because they failed to develop certain personal characteristics as a consequence of their environmental or genetic backgrounds. Rather, the rule's discriminatory impact is the result of the historical fact that in the past far more men than women chose to work in defendant's Ottawa plants, with the result that substantially more than half of the employees in those plants are now men. Defendant asserts, and there is nothing in the record contradicting its assertion, that in some of its other plants historical circumstances operated differently and there is a majority of female workers. In those plants, the no-spouse rule, which is in effect on a company-wide basis, has a discriminatory impact on men.

This would be a different case if plaintiffs had shown that defendant historically employed more men than women in its Ottawa plants because it intentionally discriminated against women. There is no evidence in the record supporting such a finding, however, and we must assume that the present disparity between men and women in the Ottawa plants was the result of noninvidious factors.

Because the no-spouse rule plausibly improves the work environment, and because it does not penalize women on the basis of their environmental or genetic background, we hold that the rule is job-related. We therefore conclude that it does not violate Title VII.

The judgment of the district court is reversed and the cause is remanded for further proceedings consistent with this opinion.

III.

ORDER OF UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

December 2, 1977.

Before

HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*

DOROTHY I. YUHAS AND NANCY ANDERSON, *Plaintiffs-Appellees,*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-1143 *vs.*	No. 72-C-2082
LIBBEY-OWENS-FORD COMPANY, *Defendant-Appellant.*	John F. Grady, Judge.

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the plaintiffs-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IV.

OPINION OF UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

DOROTHY I. YUHAS, ET AL.,
Plaintiffs,

vs.

No. 72 C 2082

LIBBEY-OWENS-FORD COMPANY,
Defendant.

[March 25, 1976]

MEMORANDUM OPINION

[GRADY, J.]

The question presented by this case is whether the defendant's policy against hiring in the same capacity the spouse of an hourly employee at its Ottawa, Illinois, plant constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* We hold that the plaintiffs have made out a *prima facie* case of a violation, but that there is a disputed issue of fact as to business justification. Accordingly, we deny the motions of both parties for summary judgment.

Although the defendant's Spouse Rule is neutral in form, its effect has been to exclude 71 women and only 3 men from

employment at the Ottawa plant. The rule has a greatly disparate impact and thus fits within *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). In *Griggs*, the Court held that a requirement that a job applicant pass two intelligence tests or have graduated from high school violated Title VII since it disqualified blacks at a rate greater than whites.

As Judge Marshall held in *United States* v. *City of Chicago*, 385 F.Supp. 543, 552 (N.D.Ill. 1974), a statistical imbalance like the one here is sufficient to establish a *prima facie* case of discrimination.

This case is thus unlike *Harper* v. *Trans World Airlines, Inc.*, 525 F.2d 409 (8th Cir. 1975), involving a related employment practice. In that case, no disparate impact was shown, and the rule had affected only five couples, a number the court found statistically insignificant.

The defendant has made two arguments against the application of *Griggs* to this case. First, it argues that *Griggs* has in effect been overruled by *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973), and by footnote 20 in *Geduldig* v. *Aiello*, 417 U.S. 484, 496 (1974). We disagree. In *Espinoza*, the court not only did not effectively overrule *Griggs*, but reaffirmed its adherence to it. 414 U.S. at 92. *Geduldig* involved not Title VII but the Fourteenth Amendment. It has been limited to the equal protection area by the Second, Third, Fourth, Fifth and Sixth Circuits. *Communication Workers of America* v. *American Telephone & Telegraph Co.*, 513 F.2d 1024 (2d Cir. 1975); *Wetzel* v. *Liberty Mutual Insurance Co.*, 511 F.2d 199 (3d Cir.), *cert. granted*, 421 U.S. 987 (1975); *Gilbert* v. *General Electronics* [*sic*] *Co.*, 519 F.2d 661 (4th Cir.), *cert. granted*, ____ U.S. ____, 96 S.Ct. 36 (1975); *Tyler* v. *Vickery*, 517 F.2d 1089 (5th Cir. 1975); *Satty* v. *Nashville Gas Co.*, 552 F.2d 850 (6th Cir. 1975); *cf. Holthaus* v. *Compton & Sons*, 514 F.2d 651 (8th Cir. 1975). We are in accord that the Supreme Court did not intend to overrule the disparate-impact doctrine by footnote 20.

The defendant's other argument is that *Griggs* applies only where there has been a showing of past discrimination, and that there is no such showing here. We disagree with this argument as well. In cases involving an absence of past discrimination, three courts have nevertheless applied *Griggs*. *Wallace* v. *Debron Corp.*, 494 F.2d 674 (8th Cir. 1974); *Gregory* v. *Litton Systems, Inc.*, 472 F.2d 631 (9th Cir. 1972); *Johnson* v. *Pike Corp. of America*, 332 F.Supp. 490 (C.D. Cal. 1971). We have been able to find no cases involving similar circumstances which accord with the defendant's position, and we find these three decisions persuasive. The purpose of Title VII is to remove sexual barriers to employment, whether overt or covert, not to punish wrongdoers. Moreover, defendant is incorrect in its assertion that there was no history of discrimination at its Ottawa plant. At the time the Spouse Rule was adopted there, the work force was 97 per cent male and 3 per cent female. Courts have commonly held in racial discrimination cases that a statistical imbalance between the employer's work force and the surrounding community raises and inference that discrimination exists and shifts the burden of persuasion to the defendant to show the absence of discrimination. *United States* v. *Carpenters Local 169*, 457 F.2d 210 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970). In *Lea* v. *Cone Mills Corp.*, 301 F.Supp. 97 (M.D.N.C. 1969), *modified on other grounds*, 438 F.2d 86 (4th Cir. 1971), this rule was applied to a sex discrimination case. The statistical imbalance in defendant's plant was so great that even if we were to accept its interpretation of *Griggs*, defendant would have the burden of establishing that it had not been engaging in discrimination. It might show such non-discrimination by showing, for example, that it received few applications from women and that women had not been deterred from applying by the belief that application would be futile. *See Lea, supra.*

Therefore, since the undisputed facts make out a *prima facie* case of violation, we deny the defendant's motion.

Under *Griggs*, once a plaintiff has established a *prima facie* case, the burden is shifted to the defendant to show that its practices "fit the job, predict performance on the job, and are necessary for the on-going effectiveness and efficiency of the particular employ[er]." *United States* v. *City of Chicago*, 385 F.Supp. 543, 553 (N.D.Ill. 1974). To justify the Spouse Rule on the grounds of business necessity, the defendant must present empirical evidence and show that there is no equally effective alternative available with a lesser discriminatory impact. *Green* v. *Missouri Pacific RR*, 523 F.2d 1290 (8th Cir. 1975); *cf. Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1321 (7th Cir. 1974). *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), did not alter that standard. Indeed, the court appeared to reaffirm it by holding that a plaintiff can rebut the business-necessity defense by showing that the employer retained white employees involved in the same activities for which a black employee was fired.

Defendant has asserted that its Spouse Rule was necessary to combat problems of absenteeism, tardiness, the scheduling of vacation time, the scheduling of shifts, procedures in handling grievances and employee morale. The only evidence presented to us involves absenteeism, and these statistics, if anything, show that the employment of married couples has no effect on absenteeism. Because we have no evidence tending to show that the Spouse Rule was not necessary to solve the other alleged problems, we must deny the plaintiffs' motion. Although at trial the defendant will have the burden of persuasion on this issue, plaintiffs have failed to demonstrate on their motion for summary judgment that there is no disputed issue of material fact.

Defendant's argument that elimination of the Spouse Rule at the Ottawa plant would conflict with affirmative action plans at its other plants is without merit. Any decree in this case would not be *res judicata* as to the other plants.

The cross-motions for summary judgment are denied.

V.

ORAL OPINION OF DISTRICT JUDGE AT CONCLUSION OF TRIAL

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

DOROTHY I. YUHAS, et al.,
Plaintiffs,

vs.

LIBBEY-OWENS-FORD COMPANY,
Defendant.

No. 72 C 2082

[December 15, 1976]

The Court [Grady, J.]: I think that the defendant has done about as good a job as could have been done to marshal evidence in support of this no-spouse rule.

I think the evidence presented showed imagination and industry on the part of counsel; but, the Court is not satisfied that there is a business justification or a job-related necessity justifying this rule.

The Court finds, first of all, that the impact of the defendant's no-spouse rule is a disparate one and that it does have the effect of discriminating against female applicants for employment at the defendant's Ottawa plant.

The Court further finds, as I have indicated, there is no legally recognized justification or necessity for the rule and I would like to elaborate somewhat on the reasons for this latter finding.

I am not satisfied from the statistical information that has been submitted that there really has been a significant problem at the defendant's plant as a result of the employment of spouses.

As I pointed out in the motion for summary judgment, Defendant's Exhibit 6 really does not bear out that there is a necessary statistical correlation between the fact of being married and the fact of being off work together.

It is true, in some cases, the absentee rates of the two employees, for instance on Exhibit C attached to Defendant's Exhibit 6, the two rates are very close; but, there are other instances where they are quite disparate.

For instance, if we just look at the couples listed on that one page, by way of illustration, there is a wide disparity between the absentee rate of the two persons who comprise couple number 2, couple number 3.

One might argue either way about couple number 4.

Couple number 6 is a wide disparity, couple number 7—

Just by way of example, roughly half the couples on that one page do not support the proposition that where one person takes off work, so does the other.

The joint absenteeism is demonstrated by Defendant's Exhibit 10 as amended. Again, in my judgment, does not prove the existence of a real problem because the figures on that exhibit include authorized absences during plant shut-downs. So, they really do not—the figures on that exhibit really do not demonstrate to the Court's satisfaction that spouses have taken off on the same day to a degree that represents a real problem in the defendant's organization.

There have been conclusions expressed by Mr. Ferguson to the effect that the employment of spouses has caused problems; but, the Court heard no hard information as to what specific production problems were ever caused in any particular case.

It is very easy, of course, to speak in generalities. It is very easy to express opinions, but the Court would have been more

impressed with evidence of specific decreases in productions or evidence of specific problems of the type that were merely hypothesized, it seems to me. I think the reason I did not hear any such evidence is that it does not exist.

Very often rules and regulations are premised upon our prejudices as to what will happen. I think it is clear from the record here that much of the defendant's fear is based upon what it feels might happen in the future if a large percentage of its work force should, some day, comprise married couples. That fear of what might happen in the future, it seems to me, to be much more real in the evidence than any actual proof that there has in fact been a significant problem in the past.

I think that Title VII of the Civil Rights Act contemplates that there has to be some accommodation by the employer to those minorities whose protection the Act ensures, by the very requirement that women be hired in the first place. Surely significant expense must be undergone by management.

For example, I am sure that most industrial plants did not have washrooms for women prior to the days that women were hired as production workers.

Surely, it would not be a defense to a Title VII action that there are no washrooms for women and it would cost a great deal of money to install them.

By the same token, I suppose the surest way to avoid any racial strives [*sic*] in industrial situations is not to hire racial minorities.

If, for example, a company hires no blacks and has no blacks on the premises, we wouldn't have any racial discord among the work force; but, surely, no one could justify, in this day and age, a policy excluding blacks on the basis that serious morale problems might ensue if blacks were hired.

One might say that the hiring of blacks would have a grave emotional effect upon the white persons on the payroll who are prejudiced against blacks and, thus, a moral [*sic*] problem would be created.

It seems to me that much of the evidence as to the morale problem that might be caused by having husband and wife working together, or in the same plant, are really analogous to what I just mentioned.

I do not think a company can premise its personnel policy on the assumption that people are going to act in an irrational and juvenile way and therefore become unmanageable.

I suppose there are instances where a husband and wife working together would cause problems in the plant and problems at home.

I suppose there are other instances where there might even be advantages to hiring spouses; but, in either case, I think that the policy cannot be based upon the most pessimistic possible prediction of what might happen, given immature conduct on the part of the married employees.

Essentially what I am saying is, while there may be something to the proposition that having spouses on the payroll and working in the same employment unit, while there may be something to the proposition that that would cause problems, that is not a sufficient justification for excluding spouses.

As far as the testimony of Mr. Silverman about the nepotism rule, the Court is not persuaded that that is a sufficient justification for the no-spouse rule.

If indeed it were essential for the operation of an industrial plant that there be a no nepotism rule of the kind he defined, I think I would have heard some evidence of problems at the Ottawa plant in more specific and concrete terms than I heard here.

I did hear evidence that Ottawa is a small town. I did hear evidence that it is one of the lesser populated areas of the state, and I can take judicial notice of those geographical facts.

It seems entirely likely to me that there are parents and children working at the Ottawa plant and that there are cousins, brothers, other siblings, and if there were anything to Mr. Silverman's theory that could be demonstrated on an empirical basis, I think I would have heard that evidence.

Now, as to the actual motivation for the rule, I think the defendant adopted the rule as one of convenience. It was no doubt sincere in its belief that by excluding spouses you would eliminate some of these problems that have been mentioned here, dual absenteeism, personality problems, possibly some morale problems; but, I think the rule was adopted really on an a priori basis rather than as a response to actual experience.

I think, had there been any substantial experience to prompt the rule, it would have been a company-wide rule and not one limited simply to the production workers.

I know of no reason why a spouse rule, if justified at all, should not be equally applied to supervisory employees, management personnel, persons who in fact play a more crucial role in the operation of the plant than does the hourly worker.

If indeed there are problems of morale and personality conflict and absenteeism that arises from a spouse relationship, it seems to me that the company would have, in recognition of that fact, made the rule applicable to all of its employees, especially to its key employees whose absence, whose morale problems, whose fits of morbidity would be much more destructive of the production of the plant than similar problems occurring in the case of an hourly employee.

For all of these reasons, I find that the spousal rule cannot be sustained, and I therefore find in favor of the plaintiffs and against the defendant on the issue of liability, both as to the prayer for injunctive relief and as to the prayer for money damages.

I will ask Mr. Kruse to draft, for the Court's consideration, an appropriate injunction order. Serve counsel with a copy of it. Perhaps you can agree on the form.

It seems to me that the scope of the injunction should be such as to prohibit the implementation of this no-spouse rule in the future.

I find nothing in the evidence to indicate that the rule should survive in even a limited category of cases.

VI.

INJUNCTION ORDER ENTERED BY DISTRICT JUDGE DECEMBER 17, 1976

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

DOROTHY I. YUHAS and NANCY ANDERSON, *Plaintiffs,*

vs.

LIBBEY-OWENS-FORD COMPANY, *Defendant.*

No. 72 C 2082

[December 17, 1976]

INJUNCTION ORDER

This action has been tried to the Court sitting without a jury on the issue of liability, and upon a consideration of the entire record herein, including the oral and documentary evidence introduced by the parties, and being fully advised in the premises, the Court hereby finds, orders, adjudges and decrees as follows:

1. The Court has jurisdiction over the parties hereto and jurisdiction of the subject matter of this action.

2. For the reasons set forth in the findings of fact and conclusions of law made by the Court on the record on December 15, 1976 at the conclusion of the trial on the issue of liability, the Court finds for the plaintiffs and against the defendant on the issue of liability, and judgment on the issue of liability only is hereby entered in favor of plaintiffs and against defendant.

3. The Court has ruled that defendant's policy at its Ottawa, Illinois plants of denying hourly rated employment to persons who are married to other hourly rated employees violates Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*), for the reasons stated by the Court in its finding and conclusions referred to in paragraph 2 above. The Court further finds that the continuation of such unlawful practice should be enjoined and that final injunctive relief of a general nature is therefore appropriate and should be granted at this time. For the aforesaid reasons, the defendant Libbey-Owens-Ford Company, and its officers, agents, servants, employees, and attorneys, are hereby permanently enjoined and restrained from maintaining, applying, enforcing or utilizing in any manner, at the Libbey-Owens-Ford Company plants and facilities in Ottawa, Illinois, any rule, practice, policy or procedure which imposes as a condition of hourly rated employment that a person's spouse not be in the employ of defendant Libbey-Owens-Ford Company as an hourly rated employee. In particular, but without limitation on the generality of the foregoing, the defendant Libbey-Owens-Ford Company, and its officers, agents, servants, employees, and attorneys, are hereby permanently enjoined and restrained from refusing to hire any person as an hourly rated employee at the Libbey-Owens-Ford Company plants and facilities in Ottawa, Illinois for the reason that such person's spouse is employed by defendant as an hourly rated employee.

4. The Court reserves for future consideration and determination the question of the individual injunctive and monetary relief, and the costs and attorneys' fees, which may be awarded in this action.

5. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court determines that there is no just reason for delay in the entry of final judgment on the issue of liability and on the issuance of final injunctive relief of a general nature, all as provided herein, and the entry of such final judgment on the issue of liability and the issuance of such final injunctive relief of a general nature are hereby directed.

VII.

CERTAIN PROVISIONS OF TITLE VII OF CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. §§ 2000e *ET SEQ.*

§ 2000e. Definitions

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any

kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to

an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

§ 2000e-2. Unlawful employment practices—Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an

employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful

employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

§ 2000e-5. Enforcement provisions—Power of Commission to prevent unlawful employment practices

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employmet practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the

Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing

or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision

named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such

civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused

employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(h) The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-1057

DOROTHY I. YUHAS AND NANCY ANDERSON,
Petitioners,

vs.

LIBBEY-OWENS-FORD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Respondent, Libbey-Owens-Ford, respectfully urges that the Petition for Writ of Certiorari filed herein by Dorothy I. Yuhas and Nancy Anderson (hereinafter Petitioners) be denied.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the Court of Appeals below properly held that the established problems which would occur in the absence of a "no-spouse" rule renders the rule manifestly related to the employment in question and thus justified by sound business considerations.

2. Whether the Court of Appeals below properly found that in the absence of any built-in headwinds against female employment, a rule justified by sound business considerations is

not in violation of Title VII where there is no evidence of intentional discrimination.

3. Whether the Court of Appeals below properly considered the statistical proof in this case pertaining to the present disparity between men and women in the Company's work force.

STATEMENT OF THE CASE.

Respondent wishes to add the following summary to the Petitioner's Statement of the Case.

At the trial in this cause, Petitioners did not introduce any evidence in their case in chief or in rebuttal. Instead, the Petitioners chose to rely upon the uncontroverted facts that at the time the no-spouse rule was adopted at the Ottawa plants, the work force consisted very heavily of male employees and that the rule at the time of trial had resulted in more females than males being disqualified from employment.

Respondent, on the other hand, proved at trial the origin of the rule, the business reasons behind the rule, the myriad difficulties which would inevitably occur in the absence of the rule, and the overall necessity of the practice for plant efficiency and morale. With respect to the latter two elements, Respondent introduced expert witness testimony of the genre of specific problems that naturally flow from employment of spouses in the same organizational unit. This evidence was not rebutted.

At the close of the trial, the District Court held that the Respondent had not established business justification for the practice because "the Court heard no hard information as to what specific production problems were ever caused in any particular case" (App. 18a). The unrebutted evidence of specific problems which would occur if the rule were eliminated was rejected on the grounds that the evidence of "problems at the Ottawa plant [was not] specific and concrete" (App. 19a).

Petitioners' rendition of the facts conveniently phrases the evidence in the record on the issue of business justification as

consisting of only "potential problems" pertaining to various facets of the employment relationship. The record, however, as found by the Court of Appeals, demonstrates that the problems testified to by Respondent's expert witness are not "potential" but rather are necessarily unavoidable consequences of the employment of spouses in the same organizational unit.

In reviewing the District Court's decision, the Court of Appeals noted that specific instances in the past of particular production problems are not the only way of establishing sound business considerations. The Court noted that the evidence clearly showed that at least four serious problems pertaining to job performance, grievance processing, supervision capabilities and hiring justify the rule's operation. The Court of Appeals then found that the evidence demonstrated that the no-spouse rule " 'improves' the work place" (App. 8a).

In this context, the Court then examined the record for any indication of intentional discrimination against females. The Court found none, and the Court therefore concluded that this is not a case where an employer has promulgated a facially neutral rule in an attempt to perpetuate the effects of past discrimination. The evidence revealed exactly the contrary—during the rule's operation, the number of women employed by the Company steadily increased. Absent evidence that the rule penalizes women on the basis of their environmental or genetic background or evidence of intentional discrimination resulting in the present disparity between men and women, the Court properly reversed the District Court by holding that the rule is premised on sound business considerations and thus not in violation of the Act.

REASONS THE WRIT SHOULD NOT BE GRANTED.

The decision sought to be reviewed here is consistent with the decisions of this Court that a facially neutral rule manifestly related to job performance is not in violation of Title VII.

Contrary to Petitioners' assertions, this is not the first case in which job-relatedness has been reviewed by the United States Court of Appeals for the Seventh Circuit, and is not in conflict with the instructions of this Court in its various decisions on this issue. Moreover, the decision does not expressly conflict with any other decision of the United States Courts of Appeals in that in every decision rendered on the validity of a "no spouse rule," courts have found the rule not violative of Title VII of the Civil Rights Act, as amended. Because this decision is in conformity with the Act and the decisions of this Court, review by the Supreme Court can only result in unsettling what has previously been settled.

ARGUMENT.

I. The No-Spouse Rule Is Manifestly Related to the Employment at Issue and Is Thus Justified by Sound Business Considerations.

Not every practice which results in a disproportionate impact between members of different races or sexes is a violation of Title VII. Neither this Court nor any lower federal court has yet so held. In particular circumstances, such a practice may be unlawful, but only if *inter alia* the practice is not "shown to be related to job performance". *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971).

Although quoting this language from the *Griggs* decision, Petitioners urge that it is not enough to demonstrate the inextricable intertwining of the practice with the employment in question. Instead, Petitioners state that it discerns from decisions of other Courts of Appeals an evidentiary test of "business necessity" far beyond any showing of job relatedness. The test propounded by Petitioners is apparently twofold:

(a) The connection between the practice and the business operation must be established by empirical evidence

demonstrating that the rule is absolutely necessary to the continued operation of the Employer's business; and

(b) Assuming such has been proven, the employer remains under an obligation to research every other possible method of eliminating that problem and proving to the plaintiffs' satisfaction that no other method exists.

No decision of this Court is cited in support of this proposition. The Courts of Appeals decisions cited by the Petitioners are in each instance factually and legally distinguishable from the proposition asserted herein, and need not be examined in the light of this Court's clear holdings.

The state of the law postulated by this Court may be found in its decisions in *McDonnell Douglas Corporation* v. *Green*, 411 U. S. 792 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975); *General Electric Company* v. *Gilbert*, 429 U. S. 125 (1976); *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324 (1977) and *Dothard* v. *Rawlinson*, ... U. S. ....., 97 S. Ct. 2720 (1977). The criterion employed through all of these cases is stated simply in the *Dothard* decision as follows:

> ". . . Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet 'the burden of showing that any given requirement [has] . . . a manifest relation to the employment in question'. . . . If, the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also 'serve the employer's legitimate interest in efficient and trustworthy workmanship'." (*Dothard* v. *Rawlinson*, ... U. S. ....., 97 S. Ct. 2720, 2726 (1977).)[1]

1. Contrary to Petitioner's assertion (Pet. Br. p. 7), the Court of Appeals for the Seventh Circuit has had prior occasions to apply the business purpose test mandated by this Court. In *United States* v. *City of Chicago*, 549 F. 2d 415, 427 (1977), the Court specifically noted its various facets.

In determining whether any given standard has a manifest relation to the employment, this Court has noted that problems "resistant to empirical proof" may well constitute "rational and neutral business justification" for a particular employment policy. *McDonnell Douglas Corporation* v. *Green, supra,* at 806, n. 21.

Among those considerations resistant to empirical proof, but yet establishing job relatedness, are the efficiency of the work force and the loyalty of the individual members of that work force. *Nashville Gas Company* v. *Satty,* ..... U. S. ....., 98 S. Ct. 347, 352 at n. 5 (1977). Similarly the loss of overall plant efficiency has been found by this Court to constitute an "undue" accommodation by an employer under Title VII. *Trans-World Airlines, Inc.* v. *Hardison,* 432 U. S. 63, 84-85, (1977).

This Court has also spoken as to the appropriate measure of proof in cases where problems are resistant to empirical proof. Thus in *Dothard* v. *Rawlinson, supra,* the Court found that the much stricter requirements of a *bona fide* occupational qualification were properly established by means of expert witness testimony, even though there was no evidence that the specific problem testified to by the expert had previously occurred.

Thus the Court of Appeals herein correctly found that the no-spouse rule's business justification is established by the testimony in the record that serious problems relating to the plant efficiency and morale would occur in the absence of the rule.

With respect to Petitioners' contention concerning other alternative methods of handling these problems, there is no finding by the District Court that any alternatives exist; nor was any rebuttal evidence placed in the record by Petitioners concerning such alternatives. The Court of Appeals rightfully refused to hypothesize on this issue because alternatives to the rule were neither presented nor found. See *Trans-World Airlines* v. *Hardison, supra.*

II. In the Absence of Any Built-In Headwinds to Female Employment, the Burden Was Properly Placed Upon the Petitioners to Establish Intentional Discrimination on the Basis of Sex.

The burden of proof in any proceeding arising under Title VII of the Civil Rights Act of 1964 rests squarely upon the plaintiff. *General Electric Co.* v. *Gilbert, supra.* In fulfilling that burden of proof, the plaintiff, as here, may attempt to posit its cause of action on the theory of "disparate impact", as that term has been defined and described by the decisions of this Court.

This Court noted in *International Brotherhood of Teamsters* v. *United States, supra,* at 349, that there may well be more than one type of "disparate impact" case. There the Court specifically stated: "One kind of practice is that which perpetuates the effect of prior discrimination. . . ." Here, the Court of Appeals, in accordance with that statement, searched the record for evidence to ascertain whether the no-spouse rule was in fact furthering any intentional past discrimination against female applicants. As shown in III *infra,* the Court properly found no such basis for questioning the stated business reasons prompting the rule.

Thus, contrary to Petitioners' assertion, the Court of Appeals did not posit as an absolute rule that intentional discrimination is part and parcel of every "disparate impact" case; to the contrary, the Court in accordance with this Court's instructions to the lower courts in *McDonnell Douglas* v. *Green, supra,* did not end its inquiry with the finding of sound business considerations underlying the rule, but rather the Court, to the benefit of the Petitioners' case, examined the record to determine whether this rule was a pretext designed to hamper employment opportunities for women.

The Court of Appeals also properly examined the record to determine whether the practice was one similar to that in issue

in *Dothard, i.e.* a rule or practice directly related to the genetic or environmental characteristics of one race or sex. In *Dothard,* the Court noted "the gist of the claim . . . does not involve an assertion of purposeful discriminatory motivation." (97 S. Ct. 2720 at 2726). The Court found disparate impact on the basis of national statistics measuring all females, and not on the basis of the particular physical characteristics of women attempting to seek employment at the defendant's facility. Specifically the Court found that over 41% of all women in the United States could not fulfill the physical characteristics criterion established by the Company as compared to only one percent of all men in the country.

This, of course, was not the issue presented to the Court of Appeals, nor is it the issue presented to the Court by the Petitioners. Here, no physical characteristic peculiar to women is involved; here, no educational or testing bias peculiar to women is presented. Here, a rule premised on the fact that of all married people 50 percent are women and 50 percent are men is presented, and this fact forms the only statistical basis in the case with respect to women. None of the cases decided by this Court or by the Courts of Appeals, touch upon impact peculiar to the subclass of women involved here, as opposed to women or racial minorities in general.

Petitioners' silence on this fact may well be prompted by the fact that in every case deciding the validity of the no-spouse rule, the court has found the rule to be lawful: *Harper* v. *Trans-World Airlines, Inc.,* 525 F. 2d 409 (8th Cir. 1975); *Smith* v. *Mutual Benefit Life Insurance Co.,* ..... F. Supp. ....., 13 FEP 252 (D. N. J. 1976); *Tuck* v. *McGraw Hill, Inc.,* 421 F. Supp. 39 (S. D. N. Y. 1976).

The Court of Appeals properly applied this Court's decisions in requiring in the particular circumstances herein proof that the rule was rooted in a pattern of intentional discrimination, in light of the sound business considerations necessitating the rule.

III. The Court of Appeals Properly Considered the Statistical Proof Pertaining to the Disparity Between Men and Women in the Company's Work Force.

Petitioners maintain that the disparity between the sexes in the composition of the Company's work force at the time the Rule was adopted at the Ottawa Plant raises a presumption of discrimination and that the Court of Appeals erred in not finding such discrimination established by the presumption.

A careful examination of this Court's decision in *International Brotherhood of Teamsters* v. *United States, supra,* supports the conclusion, however, that the Court of Appeals properly considered the statistical proof referred to by Petitioners. In *Teamsters,* unlike here, the Court noted that the Government's case was not based upon "statistics alone", but included testimony of "40 specific instances of discrimination." This Court further noted that the use of statistics is approved "where it [has] reached proportions comparable to those in this case."

Here, the statistics relied upon do not reach such proportions. In fact, the statistics herein are totally infirm in that there is no showing of any comparable statistics of what the work force could fairly be expected to demonstrate in terms of the availability of females for heavy manufacturing work.

More importantly however, this Court in *Teamsters* has cautioned the lower courts that the "usefulness [of statistics] depends on all the surrounding facts and circumstances".[2] The surrounding facts and circumstances of the present case, such as the increasing number of women in Respondent's employment both in absolute numbers and percentages participation rate, do not justify the conclusion that such presumption is appropriate here.

2. The Fifth Circuit, which Petitioners maintain follows a rule of presumption on bare statistics alone had occasion quite recently to rule that prior discrimination was not proved in all the circumstances presented by a mere showing of a marked disparity between members of different races in particular job classifications. *Weber* v. *Kaiser Aluminum and Chemical Corp.,* ..... F. 2d ....., 16 FEP 1, 7 (5th Cir. 1977).

Moreover, in any event, if the bare statistics could be read as establishing an inference of prior discrimination, this Court in *Hazelwood School District* v. *United States,* ..... U. S. ....., 97 S. Ct. 2736 (1977), mandated that an employer must be given the opportunity to show "the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination". See also *International Brotherhood of Teamsters* v. *United States, supra,* at 360.

In the instant case, the Respondent showed just that. Specifically the evidence before the Court of Appeals revealed that the month Petitioner Yuhas applied for employment in 1969 was the first significant hiring of any factory employees since 1960. None of the decisions referred to by the Petitioners have found discrimination on the basis of a statistical imbalance in the work force during the decade preceding the decade in which Title VII was enacted. See generally *United Air Lines, Inc.,* v. *Evans,* 431 U. S. 553 (1977).

Finally, contrary to Petitioners' assertions in their brief, the Respondent did offer an explanation for the seeming disparity between men and women in the work force. The Seventh Circuit properly found that the present imbalance was a historical development and was not the result of discriminatory conduct by the Company. In support of that holding, the Seventh Circuit pointed out that at other plants of the Respondent, "historical circumstances operated differently and there is a majority of female workers. In those plants, the no-spouse rule, which is in effect on the company-wide basis, has a discriminatory impact on men" (App. 9a). As set forth earlier, those are the very facts and circumstances which this Court held in *Teamsters* had to be examined before deciding what weight should be given statistical proof in a Title VII case. In this regard, it should be noted that the District Court made no finding of prior discrimination after the trial on the merits.

For the foregoing reasons, the Respondent maintains that the Seventh Circuit, in accordance with the opinions of this Court,

properly considered the only statistical evidence presented in this case pertaining to the disparity between men and women in the Respondent's work force.

CONCLUSION.

Based on the foregoing, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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